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No. 422

In the Supreme Court of the United States

October Term, 1963

[redacted] ARNOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 422

MILTON ARONSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–9) is reported at 319 F. 2d 48. The opinion of the district court on petitioner's original motion for a change of venue (D.A. 145–148) [1] is reported at 25 F.R.D. 172.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1963. A petition for rehearing was denied on July 3, 1963. On July 23, 1963, Mr. Justice Harlan extended the time for filing a petition for a

[1] The petitioner's appendix in the court of appeals is designated as "D.A.," and the government's appendix is designated as "G.A.". The original record before the court of appeals, which includes the trial transcript and which we are filing with this brief in opposition, is designated as "Tr."

writ of certiorari to and including August 17, 1963, and on August 10, 1963, he extended the time for filing until August 31, 1963. The petition was filed on August 30, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in refusing to grant a change of venue.

2. Whether the prosecution improperly used grand jury subpoenas to summon witnesses for questioning.

3. Whether it was error to disclose on direct examination of a co-defendant who testified as a government witness that he had pleaded guilty before trial.

RULE INVOLVED

Rule 21 of the Federal Rules of Criminal Procedure provides in part:

> (b) The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

STATEMENT

A 30-count indictment returned in the Southern District of New York charged petitioner, his brother Sylvan Aronson, 17 other individuals and a corporation with fraudulent interstate transactions in the sale

of unregistered securities in violation of 15 U.S.C. 77(e), 77(q) and 77(x), and a conspiracy to commit such offenses (D.A. 13–50). The charges against petitioner and his brother were severed for trial on the government's motion, and only three counts (Counts 1, 2 and 30) were submitted to the jury. Petitioner was convicted, and his brother acquitted, on these three counts. Petitioner was sentenced to concurrent terms of imprisonment for three years.

1. The sufficiency of the evidence is not challenged. Briefly, it showed the following: In June 1957, petitioner organized a Nevada corporation called Great Western Enterprises, Inc. (Tr. 427–430). He arranged to have it appear that only Nevada residents had subscribed for its stock so that it could avoid registration under 15 U.S.C. 77c(a)(11) (Tr. 119–128, 199–200). Petitioner actually retained control over the stock; the subscribers never received their stock certificates or the proceeds from any subsequent sales (see, *e.g.*, Tr. 260, 2[illegible]). In August 1957, petitioner met in New York City with Joseph C. Kimball and with Kimball's son. It was agreed at this meeting that the Kimballs' company, Kimball Securities, Inc., located in New York, would sell up to one million shares of Great Western stock to the public. Proceeds of these sales, which were to be facilitated by information which petitioner was to send to the Kimballs, were to be divided between petitioner and the Kimballs. In addition, both parties agreed to make efforts to push up the price of the stock from time to time (D.A. 68–74).

Thereafter, petitioner sent to Kimball a false typewritten statement recommending the purchase of Great Western stock. This statement was printed by Kimball and mailed to 5,000 prospective customers. It asserted that Great Western had interests in the oil and mining businesses and set forth the qualifications of its officers (G.A. 16–17; D.A. 72–73; Tr. 766–767). In fact, Great Western did not own, operate or have any interest in oil or mining properties, and it had no income or earnings (Tr. 480–481). Several options which it had owned in June and July of 1957 were permitted to lapse without any attempt to exercise them (see, *e.g.*, Tr. 442, 465, 611, 1172–1173). The claims concerning the experience of Great Western's management were also false (see, *e.g.*, Tr. 1201–1207, 1210–1212). Public purchase of the stock was further stimulated by quotations which petitioner caused to appear in the National Daily Quotation Bureau publication of prices for over-the-counter stocks. During a three-month period, from September 1957 to December 1957, the conspirators succeeded in raising the price of the stock to the public from $.35 per share to $1.15 per share (Gov't. Ex. 92, 92a, 92b).

2. The indictment which was filed on December 7, 1959, charged in counts 1 and 2 that petitioner, his brother, the Kimballs and other co-defendants had caused confirmations of the purchase of Great Western stock to be mailed to two specified purchasers. Counts 3 through 14 charged mailings in furtherance of a similar fraudulent scheme involving the sale of stock of Mark, Inc., and of Perry Oil Company, which were successors to Great Western. Counts 15 through

24 charged telephone communications in furtherance of the fraudulent scheme. Counts 25 through 29 charged the use of the mails to sell stock of Mark, Inc., and of Perry Oil Company, both of which were unregistered securities. Count 30 charged an over-all conspiracy unlawfully to sell the stock of Great Western, Mark, Inc., and Perry Oil Company (D.A. 13–50).

On February 2, 1960, petitioner and his brother, residents of California, moved under Rule 21(b) of the Federal Rules of Criminal Procedure for a change of venue to the Southern District of California.[*] They asserted that they would require the testimony of witnesses from California and that they were financially unable to bear the burden of transporting the witnesses and otherwise defending the action in New York (Tr. 2308–2330). The district court denied this motion (D.A. 145–148). It found, *inter alia*, that "the center of the allegedly fraudulent scheme was in New York City," that most of the defendants and potential witnesses lived in or near New York, and that the documentary evidence was nearby. Accordingly, it held that a transfer to California "would not be 'in the interest of justice.'" 25 F.R.D. 172, 175.

On January 16, 1961, Kimball Securities, Inc., the distributor of the stock, and its chief officers, Joseph C. Kimball and Frank S. Kimball, pleaded guilty (Tr. G). On August 28, 1962, after trial had been delayed by a succession of substitutions of defense

[*] In support of this motion for transfer petitioners sought a bill of particulars to require the government to state that certain acts alleged in the indictment were performed in California (Tr. 2314–2319). The government conceded that these acts were performed in California or Nevada (Tr. 2316; G.A. 2).

counsel, a claim that petitioner was ill, and then the illness of the district judge to whom the case had been assigned (G.A. 3–5), counsel for petitioner's brother told the United States Attorney that he would renew the motion for transfer in light of the guilty pleas that had been entered subsequent to the ruling on the initial motion (G.A. 6). This request was made orally at a pretrial conference on September 7, 1962. On the same date, the government moved that the trial of petitioner and his brother be severed from that of the other remaining defendants. The government proposed to restrict the trial of petitioner and his brother to six of the thirty counts and suggested that the remaining defendants, all salesmen of the securities, be tried one week after the termination of the trial against the Aronsons (D.A. 163). In support of the severance, the government stated that the Aronsons had been actively involved in the scheme only until early in 1958, and that the other defendants remaining to be tried were salesmen who became involved after Great Western merged into Mark, Inc. (which was later called Perry Oil Company). The decision to seek a severance was reached after August 14, 1962, when Robert Cass, who was the connecting link between Great Western and Mark, Inc., dropped out of the trial by pleading guilty (D.A. 166; Tr. 2840, I). The motion to sever was granted (Tr. 2787).[3]

[3] The trial of the Aronsons began on October 1, 1962, and terminated on October 19, 1962. The trial of the salesmen commenced on October 29, 1962 (Tr. J–K). See *Ross* v. *United States*, No. 327, O.T. 1963; *Gordon* v. *United States*, No. 431, O.T. 1963.

The court advised the Aronsons to file their renewed transfer motion in writing (Tr. 2756). This was done on September 14, 1962. Petitioner again stated that he resided in California and alleged financial hardship and inability to call character witnesses (D.A. 149–159). The motion was again denied. The court noted, among other things, that the indictment alleged that certain persons were defrauded in the sale of securities "by representations emanating from New York but resulting from the activities of the defendants" and that the fraudulent sales of securities "were brought about" in New York. It also observed that transfer to California would result in "considerable delay until a judge could be secured to try the case there and until the government attorneys in California could become acquainted with the case." The court stated that if petitioners were indigent, witnesses could be brought to New York at government expense. Consequently, it concluded that transfer at that time would not be in the interest of justice (D.A. 161–162).

ARGUMENT

1. Rule 21(b) of the Federal Rules of Criminal Procedure provides for transfer to another district of a case involving an offense which was committed in more than one district "if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged." Whether or not a transfer would be in the interest of justice is a question that is manifestly within the

discretion of the trial judge. Unless the trial court has acted arbitrarily, its decision should not be disturbed. *Kott* v. *United States*, 163 F. 2d 984 (C.A. 5), certiorari denied, 333 U.S. 837; *Sharin* v. *United States*, 164 F. 2d 566 (C.A. 4) certiorari denied, 333 U.S. 837.

The district court, in denying both the original and renewed motions, acted well within its discretion. Initially, when there were twenty defendants facing trial, the court, though aware of the possibility of trying the Aronsons alone in a separate trial in California, weighed the nature of the charge and the residence of the other defendants, and concluded that the interest of justice required neither two similar trials nor a transfer of the entire case to the Southern District of California. And even after it was determined that the Aronsons would be tried separately, the court was justified in focusing its attention on the place where the fraud was executed. The very heart of the case—the agreement between the petitioner and the Kimballs to sell Great Western stock—was concluded in New York; and it was from New York that the objective of the scheme—the public offering and distribution of the misrepresented stock—was managed. Indeed the precise substantive offenses charged in counts one and two—the unlawful mailings—were not performed in California at all.

In addition, the court properly considered the likelihood that transfer would cause additional delay in a proceeding that was almost three years old. When, as here, there is a substantial basis for jurisdiction in the district where the indictment was brought, the

court should surely be permitted to consider the likelihood of delay as an element in deciding whether the "interest of justice" requires transfer to another district.

There is no substance to petitioner's constitutional claim that the case should have been prosecuted where he resides. Congress has the power to fix the venue of a criminal prosecution in any district where the crime was committed. *Travis* v. *United States*, 364 U.S. 631. Congress has provided that a case of this nature may be prosecuted not only where the scheme originated but also where it was executed. *United States* v. *Cashin*, 281 F. 2d 669 (C.A. 2). Here the record is clear that petitioner caused the fraud to be carried out in the Southern District of New York.

2. At the trial it was disclosed that in September 1962, two witnesses who testified for the government were summoned to New York by grand jury subpoenas. These witnesses, with whom the government had not previously communicated, were questioned by Assistant United States Attorneys but were not brought before the grand jury (D.A. 53–65). Petitioner moved to suppress the testimony of these witness on the ground that the subpoenas constituted an abuse of process. In support of his claim that the subpoenas were merely devices whereby the government could compel the attendance of witnesses for interviews, petitioner sought to put on the stand the Assistant United States Attorneys in charge of the case. One of the Assistants represented to the court that, following the guilty plea of the defendant Cass, the

government had considered obtaining a superseding indictment by a grand jury which was then in session. For this purpose it had subpoenaed the two witnesses in order to present their testimony to the grand jury. The court then refused the offer of the Assistant United States Attorney to take the stand and testify under oath to this effect, and it denied the motion (D.A. 86–89).

It was patently proper for the government to subpoena witnesses needed for the superseding indictment which was contemplated. The fact that the witnesses were not brought before the grand jury did not establish that they had been subpoenaed in bad faith. The district court, whose responsibility it is to supervise the activities of the grand jury, could accept as true the representations of the Assistant United States Attorney as to his motive, and it was not compelled to place him under oath in order to make this finding of fact.[4]

Moreover, even if the subpoenas had been improper, this would not have justified exclusion of the testimony of the two witnesses. For there was no showing that the testimony offered by the witnesses at the trial, which was subject to full cross-examination, was

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[4] Petitioner also argues, without any record reference and in the abstract, that he was denied the right to subpoena witnesses at government expense (Pet. 16–17, 23). No potential witnesses are named. While the record shows that petitioner's brother, who was acquitted, unsuccessfully sought to subpoena Bernard Reed and 13 character witnesses at government expense (Tr. 2714–2719), it also demonstrates that his brother finally did use Reed and two of the character witnesses (Tr. 1321, 1345–1346, 1352).

the product of the allegedly improper activity. Petitioner never suggested or offered to prove that the witnesses was coerced or intimidated in any way. He assumed that the dispositive issue was the motive of the Assistant United States Attorney in subpoenaing the witnesses.

3. At the outset of the direct examination of government witness Joseph C. Kimball, he was questioned about his prior criminal convictions. Kimball testified that he had pleaded guilty to several charges involving the sale of securities in this case (D.A. 66–67). Kimball then went on to testify to facts which showed that both he and petitioner were guilty of violating the Securities Act (D.A. 68–84). In its charge, the court instructed the jury that it should not consider Kimball's guilty pleas as evidence against the petitioner (D.A. 100–101). The court also instructed the jury that Kimball's testimony, being that of an accomplice, should be received "with care and scrutinized with caution" (D.A. 113).

Petitioner's contention that he was prejudiced by the fact that Kimball's guilty plea was brought to the jury's attention is without merit. Kimball did not indicate whether he pleaded guilty to any of the three counts involved in the trial of the Aronsons. Moreover, even if the jury could infer from his statement that he had pleaded guilty to counts 1, 2, or 30, this knowledge was no more damaging to petitioner's defense than were Kimball's full admissions pertaining to his dealings with petitioner, which necessarily included confessions of his own guilt. And since the witness' guilty plea clearly was material on the ques-

tion of his credibility, so that if it had not been brought out on his direct examination the defense would, in all likelihood, have examined on the subject,[5] the inquiry was relevant to a legitimate issue. Indeed, as the court of appeals observed, "[n]ot to have [inquired] * * * would surely have subjected the prosecution to criticism" (Pet. App. 5).[6]

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] Counsel for petitioner's brother brought out on cross-examination that Kimball's son, who was not a witness, had pleaded guilty, and also inquired as to the precise counts to which Kimball had pleaded (Tr. 831–832).

[6] We do not believe the decision below conflicts with any of the cases cited by petitioner. Those decisions all show circumstances where the guilty plea was used by the jury in determining the guilt of the defendant on trial. While the ground for the decision in *Babb* v. *United States*, 218 F. 2d 538 (C.A. 5) is not clear, the court there refused to instruct the jury not to consider the guilty pleas as evidence of the defendant's guilt.

U.S. GOVERNMENT PRINTING OFFICE 1963